BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

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APPLICATION TO CHANGE WATER RIGHT NO. 40S 30159562 BY RICHLAND COUNTY CONSERVATION DISTRICT (NEIL J IVERSEN, PRODUCER)	)))))	**PRELIMINARY DETERMINATION TO GRANT CHANGE**

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On February 27, 2023, Richland County Conservation District (Applicant) submitted Application to Change Water Right No. 40S 30159562 (Producer – Neil J. Iversen) to change Conservation District Water Right 40S 30159245 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application is to change a portion of the Richland County Conservation District Water Reservation 40S 84500-00 by adding a point of diversion and place of use. The Application was determined to be correct and complete on June 12, 2023. The Department held a pre-application meeting with the Applicant on February 6, 2023. An Environmental Assessment for this Application was completed on June 13, 2023.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606-CD, Conservation District Application to Change Water Reservation
- Attachments
- Maps showing the proposed point of diversion and place of use

Information within the Department's possession/knowledge:

- DNRC Water Right Database records
- USGS gaging station #06185500 data for the Missouri River near Culbertson (period of record April 1958 – January 2023)
- Lower Missouri River Basin Final Order of the Board of Natural Resources & Conservation, December 30, 1994.

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, MCA). **NOTE:** CD means conservation district; and producer means the applicant who applied to the CD to use a portion of the CD water reservation water right.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

WR TYPE	WR NUMBER	WR PRIORITY DATE	WR SOURCE
Water Reservation	40S 84500-00	7/1/1985 8:00 am	Missouri River
CD Record	40S 30159245 (RI-032M)	8/24/2021 9:00 am (internal priority date)	Missouri River

CHANGE PROPOSAL

FINDINGS OF FACT

1. This application is to add a point of diversion in the NWNWSW Section 8, T27N, R55E, Richland County, and places of use in the NWNW, SWNW, NWSW, & SWSW of Section 17, T27N, R55E, and the NENE, SENE, NESE, & SESE Section 18, T27N, R55E, Richland County, to the Richland County Conservation District Water Reservation (40S 84500-00). Figure1 shows the proposed project site.

2. A flow rate of 1,000 gallons per minute (GPM) up to a volume of 220 acre-feet (AF) of the Richland County Conservation District water reservation is proposed for sprinkler irrigation on 110 acres of grass hay from April 1 to October 31.

3. There are no supplemental water rights for the 110 acres to be irrigated.

4. According to the 2020 Water Reservation Record, the Richland County CD had 74.34 CFS and 15,411 AF remaining in their water reservation prior to the submission of this application.

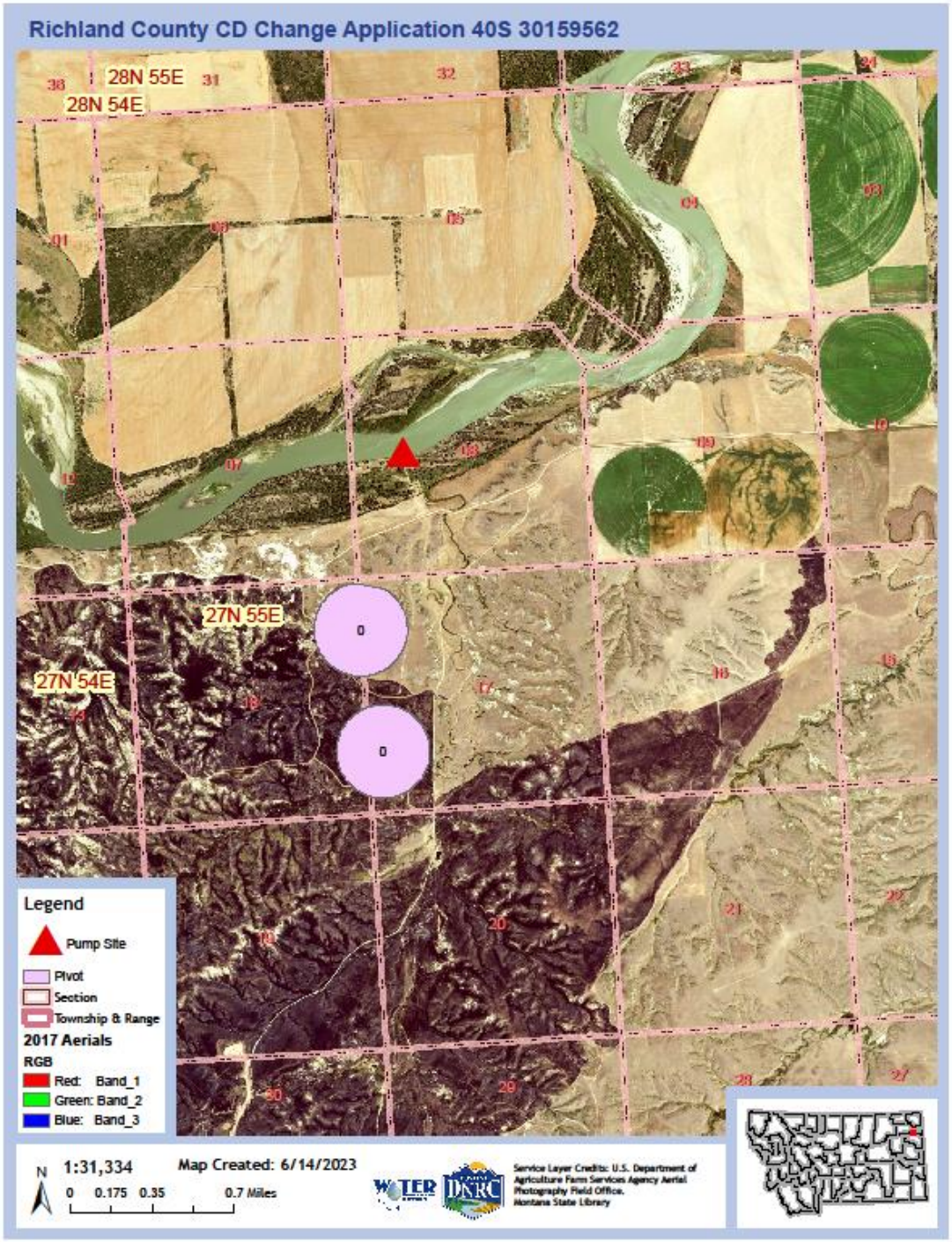

Figure 1: Location of pump site and irrigation fields for Change Application No. 40S 30159562.

5. The CD granted the producer (Neil J. Iversen) a right to use a portion of the CD water reservation on February 17, 2023. The CD granted the approval subject to the installation of a water measuring device. As such, the DNRC will add the following condition:

WATER MEASUREMENT RECORDS REQUIRED
METHOD OF WATER USE MEASUREMENT WILL BE BY FLOWMETER. THE MEASUREMENT OF WATER USED WILL BE RECORDED AND REPORTED TO THE CONSERVATION DISTRICT ANNUALLY BY NOVEMBER 15.

CHANGE CRITERIA

6. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

> (2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:
> (a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
> (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.
> (c) The proposed use of water is a beneficial use.
> (d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-

320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

7. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

8. An authorization for change is required in §85-2-316(12), MCA, because the producer's proposed point of diversion and place of use are outside the project areas identified in the original water reservation application public notice.

WATER RESERVATION CRITERIA

FINDINGS OF FACT

9. The purpose for the Water Reservation was established by the Board of Natural Resources and Conservation and the conclusions are contained in the *Lower Missouri River Basin Final Order* dated December 30, 1994.

10. The need for the Water Reservation was established by the Board of Natural Resources and Conservation and the conclusions are contained in the *Lower Missouri River Basin Final Order* dated December 30, 1994.

11. The amount of water necessary for the purposes of the Water Reservation was established by the Board of Natural Resources and Conservation and the conclusions are contained in the *Lower Missouri River Basin Final Order* dated December 30, 1994.

12. The Board of Natural Resources and Conservation found the Water Reservation to be in public interest and the conclusions are contained in the *Lower Missouri River Basin Final Order* dated December 30, 1994.

13. This change application is consistent with the purpose, need, amount, and public interest established by the Board of Natural Resources and Conservation.

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

14. The Board of Natural Resources and Conservation granted the Richland County Conservation District a water reservation (40S 84500-00) for 186.9 CFS up to 25,349 AF for use on 11,141 acres for future irrigation development out of the Missouri River. The water reservation was granted in the *Lower Missouri River Basin Final Order* dated December 30, 1994 with a priority date of July 1, 1985.

15. This application is to change a portion of the water reservation not yet put to use and therefore no historic use for the amount of water being changed exists.

FINDINGS OF FACT – Adverse Effect

16. Richland County CD is proposing to add a new pivot sprinkler project to its water reservation. The new project will add a new point of diversion and place of use. The proposed period of diversion and period of use are April 1 to October 31.

17. Water is still physically and legally available in the amount the Applicant seeks to appropriate under the Richland County CD water reservation.

18. The CD published notice of this proposed project on January 4, 2023 in the Sidney Herald and set a February 17, 2023 deadline for objections.

19. The CD sent individual public notices to water users downstream of the proposed point of diversion and to the entities on the DNRC standardized list of entities to notice.

20. No objections were received by the CD to this project.

21. The Richland County CD requires the water user to keep written records of the flow rate and volume of all water diverted and to submit the report to the Conservation District annually by November 15. The method of water flow measurement will be by flow meter.

22. The Applicant is seeking to divert 220 AF to irrigate 110 acres of grass hay. Consumptive volume was calculated by the Applicant using the Culbertson, MT weather station. This station was chosen because it is closest to the proposed irrigated acres. The Applicant used a total monthly evapotranspiration for 26.57 inches per year, minus effective precipitation for dry year (80% chance) of 4.46 inches, for a total net irrigation requirement of 21.93 inches per year. The total net irrigation requirement is then adjusted for carryover moisture of 0.5 inches at the beginning of the season and 0.5 inches at the end of the growing season, which equals 20.93 inches net irrigation requirement. Using a management factor of 74.6% per ARM

36.12.1902, irrigation will consume 20.93 inches / 12 inch/ft x 74.6% x 110 acres =143.1 AF per year. Adding 10% of the diverted volume (220 AF) as irrecoverable losses from pivot operation, the total consumptive use is 143.1 AF + 22 AF = 165.1 AF.

23. There is no historic return flow because the water has not yet been put to use. Based on a diverted volume of 220 AF and a consumptive volume of 165.1 AF, 54.9 AF will eventually return to the Missouri River downstream of the place of use.

24. This application represents a non-perfected portion of the Richland County CD water reservation. Therefore, water rights both senior and junior to Water Reservation No. 40S 84500-00 must be considered in order to determine whether this proposed application would have adverse effect. USGS gaging station #06185500, Missouri River near Culbertson, was used to calculate flow rate and volume physically available during the proposed period of diversion. The Culbertson gaging station is approximately 12 miles downstream of the POD and has a period of record from April, 1958 to January, 2023. Water physically available was calculated by taking the median of the mean monthly flows (CFS) and adding in all water rights between the requested POD and the gaging station. Table 1 lists the existing water rights between the POD and the gaging station:

Table 1: Existing Water Rights between Proposed POD and Gaging Station

Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion	Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion
40S 184965 00*	0.1	7	01/01 to 12/31	40S 163084 00**	1.9	104	04/01 to 10/31
40S 30142616*	0.1	2	01/01 to 12/31	40S 30030881	2.7	0	04/01 to 10/31
40S 30073870	0.1	1	01/01 to 12/31	40S 78203 00	4.5	1202	04/01 to 10/31
40S 30142619*	0.1	0	01/01 to 12/31	40S 38071 00	1.1	162	04/01 to 10/31
40S 1549 00	1.8	257	01/01 to 12/31	40S 30022265	4.5	459	04/01 to 11/01
40S 30073871	0.0	304	01/01 to 12/31	40S 178504 00**	1.8	400	04/01 to 11/01
40S 142790 00	0.5	135	01/01 to 12/31	40S 101074 00	5.8	927	04/15 to 10/15
40S 30142621*	0.1	0.03	01/01 to 12/31	40S 106990 00	4.2	636	04/15 to 10/15
40S 1508 00**	3.8	348	03/01 to 12/04	40S 103671 00	2.5	360	04/15 to 10/15
40S 30046592**	7.4	685	03/01 to 12/04	40S 42905 00**	1.0	68	04/15 to 10/19
40S 101303 00**	1.2	80	04/01 to 09/30	40S 42906 00**	3.6	238	04/15 to 10/19
40S 30150186	0.8	69	04/01 to 10/15	40S 96357 00	5.8	795	04/15 to 10/31
40S 30012791	6.0	414	04/01 to 10/15	40S 11957 00**	1.0	100	05/01 to 09/19
40S 30027595	4.1	284	04/01 to 10/15	40S 5134 00**	1.4	150	05/01 to 09/30

40S 30027588	3.9	273	04/01 to 10/15	40S 101292 00**	6.2	1738	05/01 to 10/19
40S 30044041	1.8	177	04/01 to 10/15	40S 17844 00	1.3	216	06/01 to 08/15
40S 30030883	6.2	0	04/01 to 10/31	40S 30022924	1.3	232	06/01 to 09/01
40S 178507 00**	1.1	70	04/01 to 10/31	40S 4947 00	1.9	350	06/01 to 09/01
40S 74355 00	1.1	120	04/01 to 10/31	40S 30022935	1.3	240	06/01 to 09/01

* These statements of claims were issued for livestock drinking directly from source. Flow rate and volume were not given; rather, these rights were assigned a consumptive rate of 30 gallons per day per animal unit. For legal availability purpose, volume is calculated by multiplying the number of animal units by 30 gallons by the number of days in the claimed period of use. Flow rate is then converted from the volume.

** These statements of claims were issued for irrigation in which a volume was not given. For legal availability purpose, volume is calculated by multiplying the number of acres by 2.5 AF/ac, an irrigation standard within those set by ARM 36.12.115(2)(e).

Tables 2 and 3 summarize the physical availability of flow and volume on the source.

Table 2: Physical Availability of Flow Rate (CFS)

Month	Median of Mean Monthly Discharge at Culbertson Gage	Water Rights Between POD and Gage	Flow Physically Available
April	8,000	79	8,079
May	8,449	88	8,537
June	9,363	94	9,457
July	9,371	94	9,465
August	8,973	94	9,067
September	7,853	88	7,941
October	6,980	67	7,047

Table 3: Physical Availability of Volume (AF)

Month	Median of Mean Monthly Discharge at Culbertson Gage*	Water Rights Between POD and Gage	Volume Physically Available
April	475,200	1,205	476,405
May	518,600	1,545	520,145
June	556,162	1,891	558,053
July	575,192	1,891	577,083
August	550,763	1,891	552,654
September	466,468	1,545	468,013
October	428,432	1,110	429,542

**Median of the mean monthly volume was calculated by multiplying the median of the mean monthly flow rates in CFS by the number of days in the month by 1.98 AF/CFS/day.*

25. The Department determined that the area of potential impact for this application is from the POD approximately 12 miles downstream to the Culbertson gaging station. Table 4 lists the existing downstream users within the area of potential impact:

Table 4: Existing Downstream Users in the Area of Potential Impact

Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion	Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion
40S 184965 00*	0.1	7	01/01 to 12/31	40S 163084 00**	1.9	104	04/01 to 10/31
40S 30142616*	0.1	2	01/01 to 12/31	40S 30030881	2.7	0	04/01 to 10/31
40S 30073870	0.1	1	01/01 to 12/31	40S 78203 00	4.5	1202	04/01 to 10/31
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40S 101303 00**	1.2	80	04/01 to 09/30	40S 42906 00**	3.6	238	04/15 to 10/19
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40S 30027588	3.9	273	04/01 to 10/15	40S 101292 00**	6.2	1738	05/01 to 10/19
40S 30044041	1.8	177	04/01 to 10/15	40S 17844 00	1.3	216	06/01 to 08/15
40S 30030883	6.2	0	04/01 to 10/31	40S 30022924	1.3	232	06/01 to 09/01
40S 178507 00**	1.1	70	04/01 to 10/31	40S 4947 00	1.9	350	06/01 to 09/01
40S 74355 00	1.1	120	04/01 to 10/31	40S 30022935	1.3	240	06/01 to 09/01

* These statements of claims were issued for livestock drinking directly from source. Flow rate and volume were not given; rather, these rights were assigned a consumptive rate of 30 gallons per day per animal unit. For legal availability purpose, volume is calculated by multiplying the number of animal units by 30 gallons by the number of days in the claimed period of use. Flow rate is then converted from the volume.

** These statements of claims were issued for irrigation in which a volume was not given. For legal availability purpose, volume is calculated by multiplying the number of acres by 2.5 AF/ac, an irrigation standard within those set by ARM 36.12.115(2)(e).

26. Water legally available was calculated by subtracting the existing legal demands, the MT Department of Fish, Wildlife and Parks (FWP) instream flow reservation (Water Reservation 40S 30017671), and the Fort Peck Tribal right (assuming full development of Fort Peck-

Montana Compact, MCA §85-20-201, Article III F.1) from the flow and volume physically available within the identified area of potential impact. Tables 5 and 6 summarize the legal availability of flow and volume on the source within the area of potential impact. The monthly volume of downstream water rights was calculated by dividing the claimed volumes by the number of months in the claimed period of use.

Table 5: Legal Availability of Flow Rate (CFS)

Month	Flow Physically Available	Existing Legal Demands	FWP Instream Flow Reservation	Fort Peck Tribal Right**	Flow Legally Available
April	8,079	79	5,178	840	1,982
May	8,537	88	5,178	1,708	1,563
June	9,457	94	5,178	2,437	1,748
July	9,465	94	5,178	3,497	696
August	9,067	94	5,178	2,927	868
September	7,941	88	5,178	1,765	910
October	7,047	67	5,178	813	989

** Flow rate in CFS is calculated by dividing monthly volume in AF by the number of days in the month by 1.98 AF/day.

Table 6: Legal Availability of Volume (AF)

Month	Volume Physically Available	Existing Legal Demands	FWP Instream Flow Reservation	Fort Peck Tribal Right	Volume Legally Available
April	476,405	1,205	307,573	50,000	117,627
May	520,145	1,545	317,826	105,000	95,774
June	558,053	1,891	307,573	145,000	103,589
July	577,083	1,891	317,826	215,000	42,366
August	552,654	1,891	317,826	180,000	52,937
September	468,013	1,545	307,573	105,000	53,895
October	429,542	1,110	317,826	50,000	60,606

27. The least amount of flow legally available in any month during the period of diversion is 696 CFS in July and the Applicant is applying for 1,000 GPM (2.2 CFS). The least amount of volume legally available in any month during the period of diversion is 42,366 AF in July and the Applicant is requesting 220 AF for the entire annual use. The Department finds the proposed change will not have an adverse effect on other users.

BENEFICIAL USE

FINDINGS OF FACT

28. This change will allow the Richland County Conservation District to authorize the use of a portion of their water reservation. The Conservation District must authorize projects to fulfill the purpose of the reservation.

29. The Applicant proposes to use water for irrigation on 110 acres. Irrigation is a recognized beneficial use under the Montana Water Use Act. §85-2-102 (5), MCA. Applicant proposes to use 1,000 GPM up to 220 AF. The volume and flow rate were agreed upon by the Conservation District and the producer. The Department finds the proposed use of water to be beneficial.

ADEQUATE DIVERSION

FINDINGS OF FACT

30. The water will be diverted from the Missouri River by a pump and conveyed to the place of use via buried pipelines. The diversion will consist of an Ames Manufacturing floating pump assembly with a Cornell model 5HH-100-4 pump powered by a 100 HP motor capable of producing 1,000 GPM. Water will be conveyed to the place of use through 6,900 feet of 12-inch SDR 26 PVC pipe and 750 feet of 8-inch 80 PSI PIP PVC pipe. The pivot was designed and will be installed by Agri-Industries.

31. The diversion and conveyance are typical of those used for sprinkler irrigation on this source in this region.

32. A McCrometer flow meter will be installed on the supply line at the pump site to measure the total amount of water diverted from the Missouri River.

33. The Department finds the means of diversion and conveyance to the place of use to be adequate.

POSSESSORY INTEREST

FINDINGS OF FACT

34. The affidavit on the Application to Change a Water Right form was signed by Ervin Goss, Vice Chairman for the Richland County Conservation District. The submission of the Application for Reserved Water (Form 102) was signed by the producer, Neil J. Iversen, and implies written consent.

CONCLUSIONS OF LAW

WATER RESERVATION CRITERIA

35. The Applicant has proven by a preponderance of the evidence that the purpose, need, amount, and public interest are consistent with the Lower Missouri River Basin Final Order dated December 30, 1994. §§85-2-316(12), 85-2-402(2)(d), MCA. (FOF 9-13)

HISTORIC USE AND ADVERSE EFFECT

36. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)("quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only"); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review,* Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to

Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).[1]

37. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11,103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.[2]

38. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the "historic use" of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department's obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.[3] A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon

[1] DNRC decisions are available at:
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

[2] See also Holmstrom Land Co., Inc., v. Newlan Creek Water District,185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff's subsequent right).

[3] A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review,* Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9,1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).[4]

39. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in

[4] Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right … the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right … which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo.,1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right … he shall file a petition requesting permission to make such a change …. The change … may be allowed provided that the quantity of water transferred … shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); ARM 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).[5]

40. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

41. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d

[5] The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(*citing* Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

> The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the "amount historically consumed" and the water that re-enters the stream as return flow. . . .
> An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator "is entitled to have the water flow in the same manner as when he located," and the appropriator may insist that prior appropriators do not affect adversely his rights.
> This fundamental rule of Montana water law has dictated the Department's determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.
> We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

42. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of evidence and analysis required for an applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

43. There is no historic use because the water being changed in this application is for future irrigation development pursuant to §85-2-316, MCA. (FOF 14-15)

44. The Applicant has proven by a preponderance of the evidence that the proposed change in appropriation will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF 16-27)

BENEFICIAL USE

45. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel*, Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

46. Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that irrigation is a beneficial use and that 220 AF of diverted volume and 1,000 GPM flow rate of water requested is the amount needed to sustain the beneficial use on 110 AC. §85-2-402(2)(c), MCA (FOF 28-29)

ADEQUATE MEANS OF DIVERSION

47. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

48. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF 30-33)

POSSESSORY INTEREST

49. Pursuant to §85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802

50. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF 34)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department determines that this Application to Change Water Right No. **40S 30159562** should be **GRANTED** subject to the following.

The Applicant is authorized to add a point of diversion and place of use. A flow rate of 1,000 GPM up to 220 AF shall be diverted from the Missouri River from the NWNWSW Section 8, T27N, R55E, Richland County, to 110 acres of place of use in the NWNW, SWNW, NWSW, & SWSW of Section 17, T27N, R55E, and the NENE, SENE, NESE, & SESE Section 18, T27N,

R55E, Richland County. The period of diversion and period of use are from April 1 to October 31. This change authorization will be subject to the following conditions, limitations, or restrictions:

WATER MEASUREMENT RECORDS REQUIRED
METHOD OF WATER USE MEASUREMENT WILL BE BY FLOWMETER. THE MEASUREMENT OF WATER USED WILL BE RECORDED AND REPORTED TO THE CONSERVATION DISTRICT ANNUALLY BY NOVEMBER 15.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 3rd day of July, 2023.

/Original signed by Todd Netto/
Todd Netto, Regional Manager
Glasgow Water Resources Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 3rd day of July, 2023, by first class United States mail.

Richland County Conservation District
2745 West Holly Street
Sidney, MT 59270

Glasgow Regional Office, (406) 228-2561